

This Opinion is not a
Precedent of the TTAB

Mailed: September 30, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board

—
In re Hangover Zero

—
Serial No. 90083241

—
Ashley D. Johnson of Dogwood Patent and Trademark Law,
for Hangover Zero.

Elissa Garber Kon, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

—
Before Zervas, Wellington and Goodman,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Hangover Zero (“Applicant”) seeks registration on the Principal Register of the standard character mark HANGOVER ZERO for goods in International Class 5 identified as:

Dietary and nutritional supplements; dietary and nutritional supplements containing one or more ingredients selected from white willow bark extract, ginger extract, alpha lipoic acid, glutamine, taurine, magnesium, potassium, zinc picolinate, selenium, Vitamin C, Vitamin D, Vitamin B12, biotin, pyridoxine, pantothenate, niacin, riboflavin, thiamine; dietary and nutritional supplements in the form of pills, drink mixes, vitamin and mineral

beverages, and edible food products, namely, food supplements, nutritional energy and meal replacement bars.¹

Applicant has disclaimed the term HANGOVER pursuant to a request by the Examining Attorney.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark is likely to cause confusion with the previously registered mark



for "dietary supplements" in International Class 5 on the Principal Register.² Registrant has disclaimed the exclusive right to use the term HANGOVER.

1. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion or mistake, or to deceive. 15

¹ Application Serial No. 90083241 was filed on July 30, 2020 based on Applicant's allegation of an intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² Registration No. 4944093, issued April 26, 2016. The mark is described as consisting of "the wording 'ZERO HANGOVER'; 'THE LAST DEFENSE'. The letters 'ZER' and 'HANGOVER' are white with a black outline; the letter 'O' in 'ZERO' consists of a red smiley face, a red tongue [sic] sticking out of a black mouth; one eye is open, with a black pupil and white eyeball, while the other eye is shut, white in color with a red line in the middle. The term 'THE LAST DEFENSE' is in white lettering with a black outline. All elements are presented against a teal background."

U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015)); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant or for which there is argument and evidence of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and

relatedness of the goods.”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

a. Similarity or Dissimilarity of the Goods, Trade Channels and Classes of Purchasers

We begin our analysis with the *DuPont* factors pertaining to “[t]he similarity or dissimilarity and nature of the goods or services” and “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *see also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018). We must base our comparison of the goods on the identifications in Applicant’s application and the cited registration. *See Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The goods are in-part identical – both the application and the cited registration recite “dietary supplements.” It is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed in the identification of goods in a particular class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6 (TTAB 2019); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015).

Turning to the channels of trade, because Applicant’s and Registrant’s goods are identical in-part, we presume that such goods travel in identical channels of trade and are sold to the same classes of purchasers. *See Cai v. Diamond Hong, Inc.*, 901

F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same). Purchasers of “dietary supplements,” found in both Applicant’s and Registrant’s identifications of goods, are members of the general consuming public.

The *DuPont* factors regarding the similarity of the goods, trade channels and classes of purchasers weigh in favor of finding a likelihood of confusion.

b. Strength of the Registered Mark

Because the strength of the cited mark may affect the scope of protection to which it is entitled, we examine Applicant’s argument that the shared terms HANGOVER and ZERO “are diluted as applied to products in International Class 005”³ before considering the *DuPont* factor regarding the similarities or dissimilarities of the marks.⁴ Applicant relies on USPTO records for third party Principal and Supplemental Register registrations for dietary supplements and other goods which

³ 11 TTABVUE 19.

⁴ 6 TTABVUE 19. References to the briefs on appeal refer to the Board’s TTABVUE docket system. Page references to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. See *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018).

contain the term HANGOVER or ZERO, but not both terms in the same mark.⁵ Applicant did not submit any evidence of third-party use of marks containing the terms HANGOVER or ZERO.

“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ...; that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak[.]” *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015)). The extent to which third-party use-based registrations bear on our determination of the cited mark’s conceptual strength depends on the number of registrations, the level of similarity between the involved marks, and the closeness of the goods or services recited in the third-party registrations vis-à-vis those in the cited registration. Third-party registrations for unrelated goods, however, are of limited probative value. *See In re i.am.symbolic*, 123 USPQ2d at 1751 (disregarding third-party registrations for goods in other classes where the proffering party “has

⁵ Applicant also submitted USPTO records for pending applications and cancelled registrations. The applications are only evidence of the fact that the applications have been filed on certain dates. *See Wet Seal, Inc. v. FD Mgmt.*, 82 USPQ2d 1629, 1634 (TTAB 2007) (“An application is not evidence of anything except that the application was filed on a certain date.”). A cancelled registration is not evidence of any existing rights in the mark. *See Action Temp. Servs. v. Labor Force*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989). An expired or cancelled registration is evidence of nothing but the fact that it once issued. *Sunnen Prods. Co. v. Sunex Int’l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987). The applications and cancelled registrations do not help us in our analysis.

neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support[s] a finding that registrants' marks are weak with respect to the goods identified in their registrations"); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (third-party registrations for goods that appear to be in fields which are far removed from the goods at issue are of limited probative value).

Applicant did not submit the full USPTO record for each third-party registration submitted. Its submissions do not indicate information about the marks such as whether the registrants entered disclaimers, or the owner of the registration, which would allow us to determine whether there are common owners of the registrations. The Examining Attorney, however, did not object to the abbreviated submissions.

Turning first to the third-party registrations pertaining to the term HANGOVER, after discounting the registrations for unrelated goods, we find that Applicant submitted 39 registrations for marks containing the term HANGOVER, all for dietary supplements or related goods. Each of these registrations apply the same meaning of the term HANGOVER, “[a] temporary, unpleasant physical condition, typically characterized by headache and nausea, following the consumption of excessive amount of alcohol.”⁶ In addition, the Examining Attorney submitted evidence indicating that dietary supplements are used to ease the effect of hangovers, suggesting that HANGOVER at a minimum identifies a feature or characteristic of

⁶ November 19, 2020 Office Action, TSDR 13 (from THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2020)).

the goods. Registrant has disclaimed the term HANGOVER. We find that HANGOVER is a merely descriptive and inherently weak term for dietary supplements and entitled to limited protection for dietary supplements.⁷

With regard to the third-party registration evidence pertaining to the term ZERO, after discounting the registrations for unrelated goods, we find that Applicant submitted 37 registrations for marks containing the term ZERO, all for dietary supplements or related goods. The term “zero” has several definitions, including a first definition, “the arithmetical symbol 0,” and a second definition “having no measurable or otherwise determinable value.”⁸ In both Applicant’s and Registrant’s marks, the term ZERO holds the second definition, “the absence of a measurable quantity.” We discount as dissimilar those registrations for marks that do not apply the second definition, ZERO DARK CHERRY, ZERO COMPROMISES PURE RESULTS, MONSTER ENERGY ABSOLUTELY ZERO, MONSTER ENERGY ZERO ULTRA, M MONSTER ENERGY ZERO ULTRA, ZERO FAT, ZERO CARB, BIOTECHUSA ISO WHEY ZERO and WHEY ZERO. We also discount ZERO IN ON NUTRITION because ZERO in this mark uses the single term “zero in.” 27 registrations remain which suggest weakness of the term ZERO in marks for dietary supplements and the like; ISOLATE ZERO, ZERO FOR HIM (two registrations), ZERO HOUR DETOX, ISOPERT ZERO, ZERO-POINT ORGANICS, GUMMY ZERO, ZERO.90 HYDRO, TYPE ZERO, ACHIEVING ZERO, ZERO APPETITE, CARE

⁷ Applicant and the Examining Attorney discuss whether the term HANGOVER is a generic term in their briefs. We need not decide that issue.

⁸ December 7, 2020 Office Action, TSDR 49.

FACTOR ZERO, ZERO BRAND, ZERO HIGH, TRIMESTER ZERO, ZERO FLUSH, ZERO IMPACT, ZERO HD, BIOTECHUSA ZERO BAR, C4 ZERO, ZERO.ONE, DR ZERO, RUSSIAN ZERO, MUSCLEPHARM ENERGY SPORT ZERO, ZERO DRAG, GIANT ZERO and PRO(ZERO) LONGEVITY PROTEIN. In view of this evidence and its meaning (“the absence of a measureable quantity”), we find ZERO in Registrant’s mark is highly suggestive for dietary supplements but inherently distinctive because it appears in Registrant’s Principal Register mark without a disclaimer or a claim of acquired distinctiveness. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007). Thus, ZERO is an inherently weak term for dietary supplements, but not as weak as the merely descriptive term HANGOVER. It is also entitled to limited protection for such goods.

c. Similarity or Dissimilarity of the Marks

We now consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion* 110 USPQ2d at 1160; *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019).

The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that confusion as to the source of the goods offered under the respective marks is likely to result. *In re i.am.symbolic*, 123 USPQ2d at 1748; *Coach Servs., Inc. v. Triumph*

Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, *6 (TTAB 2019). The focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *Double Coin Holdings*, 2019 USPQ2d at *6; *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1160; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). But there is nothing improper in giving more or less weight to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Where the goods of Applicant and Registrant are identical-in part as they are in this case, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods. *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

We set forth Registrant’s mark again, for easy reference:



The mark consists of two groups of words, ZERO HANGOVER on top and THE LAST DEFENSE on bottom, slightly separated from one another. THE LAST DEFENSE is in smaller lettering at the bottom of the mark, and all of the wording in the mark is in essentially the same font on a teal background. The letter “O” in “ZERO” consists of a red smiley face with a red tongue sticking out of a black mouth, and having one eye open with a black pupil and white eyeball, and another eye shut, with a red line in the middle.⁹ Due to ZERO HANGOVER’s position at the top of the mark and in larger lettering, as well as its incorporation of a colorful design element for the letter “O” in ZERO, we find that the dominant portion of Registrant’s mark is the wording ZERO HANGOVER which consumers would most likely remember and use to call for the goods.

Applicant’s standard character mark HANGOVER ZERO is composed of the same two words as the first two words at the top of Registrant’s mark, but in reverse word order.

We find no distinguishable difference in connotation when the two terms are reversed. Both ZERO HANGOVER and HANGOVER ZERO essentially convey that

⁹ The Examining Attorney states that “the design and slogan in the registered mark reinforce the meaning of ZERO HANGOVER” without an explanation for her finding. 8 TTABVue 6. We do not see the reason why a winking red smiley face with a protruding tongue reinforces the meaning of ZERO HANGOVER.

the goods are intended for avoiding or ameliorating hangovers. The slight differences in meaning noted by Applicant are ones that a consumer of the identified goods would not likely notice or remember. In addition, the wording THE LAST DEFENSE in Registrant's mark does not dictate a particular meaning for ZERO HANGOVER. Consumers may construe THE LAST DEFENSE as an indication that the dietary supplement should be taken just prior to drinking alcohol, or, once the purchaser has a hangover, that the goods are the last remedy against the hangover.

As for appearance and sound of the two marks, they are similar due to the shared terms. While the design element that forms the letter "O" in ZERO is not found in Applicant's mark, the design is an integral part of that word and would be considered as the letter "O" in "ZERO." "[T]he verbal portion of a word and design mark likely will be the dominant portion. ... This makes sense given that the literal component of brand names likely will appear alone when used in text and will be spoken when requested by consumers." *In re Viterra*, 101 USPQ2d at 1911. We note as well that Applicant's standard character mark may be depicted in the same or a similar font style, size or color as ZERO HANGOVER in Registrant's mark. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *In re Viterra* 101 USPQ2d at 1910.

We have found above that the terms ZERO and HANGOVER are weak terms for dietary supplements, with HANGOVER being the weaker of the two and that there are elements in Registrant's mark that do not appear in Applicant's mark. However, there are no third-party registrations in the record for marks containing both

HANGOVER and ZERO for dietary supplements. In addition, there is no evidence of third-party use of marks containing these terms. ZERO HANGOVER in Registrant's mark is prominently positioned in Registrant's mark. In view thereof, and because the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods when Applicant's and Registrant's goods are identical-in part as they are in this case, *see Shen Mfg. v. Ritz Hotel*, 73 USPQ2d at 1354; *Century 21 Real Estate v. Century Life of Am.*, 23 USPQ2d at 1700, we find the marks to be more similar than different in appearance, meaning and sound, as well as in commercial impression. Even weak marks are entitled to protection against confusion. *See In re Max Capital Grp.*, 93 USPQ2d at 1246 (TTAB 2010);

The *DuPont* factor regarding the similarity or dissimilarity of the marks weighs in favor of finding a likelihood of confusion.

d. Purchaser Care

Applicant argues as follows regarding the *DuPont* factor involving the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing,” *DuPont*, 177 USPQ at 567:

Both Applicant's and Registrant's consumers are those seeking to ingest a product. Specifically, Applicant's consumers are seeking a product to alleviate the symptoms of a hangover (e.g., nausea, headache, fatigue). The consumers of the cited Registration, on the other hand, are seeking a product to stave off the symptoms of a hangover before they set in. Thus, both Applicant's and Registrant's consumers would be discerning about taking a medicinal

product and would do research prior to purchasing products to alleviate a hangover or prevent a hangover.¹⁰

Considering the particular nature of the goods herein, we find that the relevant consumers for dietary supplements will exercise at least a moderate degree of consumer care when purchasing such goods and, therefore, this *DuPont* factor weighs slightly against finding that there is a likelihood of confusion.

e. Conclusion

We have found that Applicant's and Registrant's goods are in-part identical and presume that they travel in the same trade channels to identical classes of purchasers. In addition, we have found the marks to be similar even though the common terms in Applicant's and Registrant's marks are weak terms. Even if relevant consumers exercise at least a moderate degree of consumer care when purchasing dietary supplements, we find that Applicant's mark for its identified goods will likely be confused with Registrant's mark for its identified goods.

Decision: The refusal to register Applicant's mark under Section 2(d) is affirmed.

¹⁰ 6 TTABVUE 19.